SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:100939/11
Motion No.:002

ARNOL LICONA-RAMIRO,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

WOODBROOKE ESTATES HOME OWNERS ASSOCIATION, INC.,

Defendant

The following items were considered in the review of the following motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Affirmation and Affidavit in Opposition	3
Affirmation in Reply	4
Memorandum of Law in Reply	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves for summary judgment dismissing the plaintiff's complaint. The motion is denied.

Facts

The plaintiff worked for Sardinia and Sons at the time of his accident. In or about February 2010 the defendant, a homeowners association, engaged Sardinia and Sons to remove concrete around the pool area, to replace the paver stones and to pour new concrete around the pool. The plaintiff's responsibility at the job site was to break up the old concrete, pour new concrete around the pool, and remove the stones, bricks and pavers that were to be replaced. In order to remove the debris from the work area the plaintiff utilized a wheelbarrow.

On May 22, 2010 the plaintiff alleges the ramp which he utilized to cart the debris from the work site had become covered with debris from the transport of the broken concrete, pavers and bricks. The plaintiff testified that on that date as he navigated his wheelbarrow with approximately 150 pounds of brick down the path, it struck a loose piece of brick and caused the wheelbarrow to push against a wall. The plaintiff testified that he saw remnants of bricks on the path that he utilized to cart the debris and that he saw the particular brick that caused his accident, but he could not describe the brick during his deposition. After losing control of the wheelbarrow he sustained serious injuries to his hand.

The defendant now moves for summary judgment arguing that the facts as presented do not state a causes of action under Labor Law § 241(6); Labor Law § 200 and common law negligence.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[1] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[2] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[3] On a motion for summary

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[1] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[2] *American Home Assurance Co., v. Amerford International Corp*., 200 AD2d 472 [1st Dept 1994].

[3] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[5]

Here, the plaintiff adequately identified remnants of broken brick as the cause of the accident.[6] Consequently, the court will not consider the affidavit of the plaintiff submitted in opposition to the defendant's motion for summary judgment.[7]

Labor Law § 241(6) Claims

To establish a prima facie cause of action pursuant to Labor Law § 241(6), a plaintiff is required to show that a defendant violated a "specific safety rules and regulations promulgated by the Commissioner of the Department of Labor," "mandating compliance with concrete specifications."[8] The plaintiff claims several violations of the Industrial Code to support his claim for relief pursuant to Labor Law § 241(6). These purported violations are as follows: 12 NYCRR 23-1.7(a), (b) and (c); 12 NYCRR 23-1.7(d); 12 NYCRR 23-1.7(e)(1) and (2); 12 NYCRR 23-2.1(a) and (b); and OSHA violations. At the outset the court must note that the plaintiff opposes the defendant's motion concerning the following purported violations:12 NYCRR 23-1.7(e)(1) and (2); and 12 NYCRR 23-2.1(a). Accordingly, the plaintiff concedes that there have not been violations as to: 12 NYCRR 23-1.7(a), (b) and (c); and 12 NYCRR 23-

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[4] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[5] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989].

[6] *See, Brown v. Linden Plaza Housing Co., Inc.*, 36 AD3d 742 [2d Dep't 2007].

[7] *See, Novoni v. La Parma Corp.*, 278 AD2d 393 [2d Dep't 2000].

[8] *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].

1.7(d). Moreover, OSHA violations cannot be grounds for a Labor Law § 241(6) claim.[9]

12 NYCRR 23-1.7(e)(1) and (2)

The language of 12 NYCRR 23-1.7(e)(1) and (2) reads as follows:

> (e)(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (e)(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Here, there is no question that the plaintiff needed to pass through area where the accident occurred in order to reach his work area. The plaintiff testified during his deposition that he was required to transport the new bricks and pavers to the pool area work site, and remove debris from the work site over the same area. In *Canning v. Barneys N.Y.*, the Appellate Division, First Department held that such a set of facts supported a Labor Law § 241(6) claim as the area was properly viewed as a "work area" under 12 NYCRR 23-1.7(e)(2) and not a "passage way" under 12 NYCRR 23-1.7(e)(1).[10] This court is hard pressed to accept the defendant's contentions that the remnants of bricks and concrete constitute an integral part of the work the plaintiff was performing and not debris. Consequently, the plaintiff's claim for a violation of Labor Law § 241(6) pursuant to 12 NYCRR 23-1.7(e)(2) may proceed, while those claims relating to 12 NYCRR 23-1.7(e)(1) are dismissed.

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[9] *See, Pellescki v. City of Rochester*, 198 AD2d 762, *lv denied* 83 NY2d 752

[10] *Canning v. Barneys N.Y.*, 289 AD2d 32 [1st Dep't 2001]; *See, Castillo v. Starrett City, Inc.*, 4 AD3d 320 [2d Dep't 2004].

12 NYCRR 23-2.1(a)(1) and (b)

The language of 12 NYCRR 23-2.1(a)(1) reads as follows:

> All building materials shall be stored in a safe and orderly manner. Material piles sh all be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

While this portion of the Industrial Code has been held sufficient to sustain a Labor Law § 241(6) claim, it has been limited.[11] In situations where the accident occurred in some place other than a passageway, walkway, stairway or other thoroughfare liability cannot be predicated on 12 NYCRR 23-2.1(a)(1).[12] Consequently, since this court has already held that the plaintiff's accident occurred in a "work area" the Labor Law § 241(6) claim cannot be based on this provision of the Industrial Code. Therefore, those claims relating to 12 NYCRR 23-2.1(a)(1) are dismissed.

The language of 12 NYCRR 23-2.1(b) reads as follows:

> Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.

The Appellate Divisions, First and Second Departments have held that this portion of the Industrial Code lacks the specificity required to support liability under Labor Law § 241(6).[13] Consequently, the claims predicated on that portion of the Industrial Code are dismissed.

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[11] *See, White v. Farash Corp.*, 224 AD2d 978 [2d Dep't 1996].

[12] *See, Rodriguez v. D & S Builders, LLC*, 98 AD3d 957 [2d Dep't 2012].

[13] *See, Fowler v. CCS Queens Corp.*, 279 AD2d 505 [2d Dep't 2001]; *Lynch v. Abax, Inc.*, 268 AD2d 366 [1st Dep't 2000]; *Mendoza v. March Libre Assoc.*, 256 AD2d 133 [1st Dep't 1998].

Labor Law § 200 and Common Law Negligence Claims

Labor Law § 200 codifies the common law duty of property owners, contractors and other employers to provide employees, and other persons lawfully on the premises, with a safe place to assemble and work.[14] Claims under this provision are not sustainable unless the party charged had the authority to control the activity that brought about the injury.[15] It has been held that a premises owner may be held liable for a workers injuries if it had actual or constructive notice of a dangerous condition at a work site.[16]

Here, the plaintiff does not contest that the defendant did not have actual notice. Instead he argues that the defendant had constructive notice of the debris surrounding the work site. "To constitute constructive notice, a condition must be a visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant to discovery and remedy it."[17] Contrary to defendant's assertions, the plaintiff testified during his deposition that the work area accumulate a significant amount of debris during the duration of the project. Whether this period of time was sufficient to constitute constructive notice is an issue of fact for determination by a jury.

Accordingly, it is hereby:

ORDERED, that the defendant's motion to dismiss is granted to the extent that claims made pursuant to Industrial Code Sections:12 NYCRR 23-2.1(a)(1); 12 NYCRR 23-2.1(b); and 12 NYCRR 23-1.7(e)(1) are dismissed; and it is further

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[14] *See, Kim v. D & W Shin Realty Corp.*, 47 AD3d 616 [2d Dep't 2008].

[15] *Singh v. Black Diamonds, LLC*, 24 AD3d 138 [1st Dep't 2005].

[16] *Smith v. Cari, LLC*, 50 AD3d 879 [2d Dep't 2008].

[17] *Yearwood v. Cushman & Wakefield, Inc.*, 294 AD2d 568 [2d Dep't 2002].

ORDERED, that the motion is denied in all other respects; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor on **Monday, March 25, 2013 at 9:30 a.m.** for a pre-trial conference.

ENTER,

DATED: March 14, 2013

Joseph J. Maltese
Justice of the Supreme Court